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IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

JURISDICTIONAL STATEMENT.

On Appeal From the Supreme Court of the State of Delaware.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the Supreme Court of the State of Delaware, dated April 15, 1976, affirming a decision by the Delaware Court of Chancery which upheld an order sequestering certain property of defendants without notice or hearing. Appellants [1] submit this jurisdictional statement to show that this Court has jurisdiction and that substantial questions are presented.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Delaware is not yet officially reported. A copy is appended to this statement as Appendix A. A copy of the opinion of the Court of Chancery of the State of Delaware in this case is attached as Appendix B.

JURISDICTION.

This is a shareholder's derivative action in which plaintiff-appellee sought to obtain personal jurisdiction over non-resident defendants-appellants by sequestering, i.e., purportedly seizing by notations on the books of the issuing corporation, capital stock owned by defendants. The Court of Chancery denied defendants' motion to quash the writ of sequestration and to dismiss. The Supreme Court of Delaware affirmed in a decision rendered April 15, 1976. The notice of appeal to this Court was filed May 7, 1976, in the Supreme Court of the State of Delaware.

1. The appellants are R. F. Shaffer, J. L. Kerrigan, F. L. Nageotte, Gerald H. Trautman, Bart Cook, R. N. Dick, William E. Hastings, Howard Boyd, H. A. Montague, Rankin M. Smith, Hans Stauffer, Harold C. Stuart, James W. Walker, Leslie B. Worthington, Jess Nicks, Ralph C. Batastini, Robert Minge Brown, David L. Duensing, Charles R. Orem, Clifton B. Cox and M. J. O'Rourke.

Jurisdiction of this Court is founded on Section 1257(2) of Title 28, United States Code, on the ground that the decision below upheld the validity of a state statute against a claim that it is repugnant to the Fourteenth Amendment of the Constitution of the United States. See *Winters v. New York*, 333 U. S. 507, 509 (1948); *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 95 S. Ct. 1200 (1975).

STATUTE INVOLVED.

The statute involved is the Delaware Sequestration Statute, 10 Del. C. § 366. It is set out in full text in Appendix C.

QUESTION PRESENTED.

Does the Fourteenth Amendment permit Delaware to coerce non-resident individual defendants to submit to personal jurisdiction of the Delaware courts, although they have no contacts with Delaware, by sequestering, without notice or hearing and without taking physical possession, capital stock owned by them in a Delaware corporation and denying them the right to defend that property unless they enter a general appearance, which would subject them to possible liability in amounts exceeding the value of the sequestered property?

STATEMENT OF THE CASE.

This is a derivative action brought by a shareholder of The Greyhound Corporation ("Greyhound") against some twenty-eight present or former officers, directors or employees of Greyhound or its subsidiary Greyhound Lines, Inc. who served at various times between 1957 and 1974. The complaint charges that Greyhound suffered losses as a result of conduct of defendants which allegedly caused Greyhound to have been found to have violated the antitrust laws as well as an order of a United States District Court.

All of the individual defendants are non-residents of the State of Delaware, as is the plaintiff. No attempt was made to serve any of them with summons or other process founded on in personam jurisdiction, or to demonstrate that any of them has contacts with Delaware sufficient to sustain personal jurisdiction.

Instead plaintiff sought to subject defendants to Delaware's jurisdiction by invoking the procedure under Delaware's Sequestration Statute, 10 Del. C. § 366, and sequestering Greyhound capital stock owned by the defendants.

On May 22, 1974, upon the filing of his complaint, plaintiff applied for and the Delaware Court of Chancery issued, without notice or hearing, an order,

(1) directing the individual defendants to appear and answer the complaint;

(2) seizing "property of the [individual] defendants in the State of Delaware;" and

(3) directing Greyhound to report on the securities held by defendants, to cause entries to be made in its books showing that the securities had been

sequestered, not to transfer those securities or permit them to be transferred, except as permitted by the order, and to do all that is necessary to hold these securities until further order.

Under the Delaware procedure, as interpreted and applied by its courts, the defendants have no remedy against the seizure, or any subsequent disposition, of their property (other than for technical non-compliance with the statute) nor do they have a right to defend against plaintiff's claims on the merits unless they "voluntarily" make a general appearance and submit to the in personam jurisdiction of the Delaware court.

How the Federal Question Is Presented.

On July 30, 1974, the individual defendants filed a notice and motion to quash service of process, to vacate the order of sequestration and to dismiss the action as to them. Their motion was based primarily on the ground that the Delaware sequestration procedure violates the due process clause of the Fourteenth Amendment of the United States Constitution.[2] A motion to modify the sequestration order was also filed by Greyhound.

On May 12, 1975, the Court of Chancery filed its opinion denying the defendants' motions and upholding the validity of the Delaware statute. Defendants appealed to the Delaware Supreme Court and, after briefing and oral argument, that court on April 15, 1976, filed its decision substantially affirming the decision of the lower court. This appeal followed.

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2. Subsequent to the filing of the motion, plaintiff was granted leave to file an amended complaint and an alias writ of sequestration was issued. It was stipulated that defendants' motion would be deemed to run against these pleadings.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents questions of substantial importance under the due process clause of the Fourteenth Amendment. The basic question is whether Delaware may seize the property of non-resident defendants without notice or hearing and then deny them the right to defend that property unless they waive their due process rights under *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), and submit to personal jurisdiction of the Delaware courts where none would otherwise exist.

I.

On the face of it, the Delaware procedure is in plain conflict with the principles laid down by this Court in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969); *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975); among others. Those cases establish that the Fourteenth Amendment bars the seizure of property without notice and hearing or other safeguards.

The constitutional defect of the Delaware procedure is compounded by the fact that it is applied so as to coerce non-residents not otherwise subject to the jurisdiction of Delaware to submit to that jurisdiction—indeed, that is the purpose of the statute. See, App. A, A13, and *Tenney v. Jacobs*, 43 Del. Ch. 526, 240 A. 2d 138, 139 (Sup. Ct. 1968). Unless a defendant whose property has been sequestered makes a general appearance, he cannot defend his right to that property and it may eventually be sold and the proceeds applied to satisfy plaintiff's claim regardless of its merits, without any hearing whatsoever. *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955); *Trans World Airlines, Inc. v. Hughes Tool Co.*, 41 Del Ch. 11, 187 A. 2d 350 (Ch. 1962).

Thus, forfeiture is the price a defendant must pay to stand on his due process rights under *International Shoe*. Conversely, Delaware's conditioning the defendant's right to a hearing on his submission to in personam jurisdiction against which the Constitution would otherwise protect denies him "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U. S. 371, 379 (1971).

> "This right to be heard has little reality or worth unless one is informed that the matter is pending and *can chose for himself whether to appear or default, acquiesce or contest.*" *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950).[3]

A defendant's coerced appearance, under threat of forfeiture of his property, hardly reflects an exercise of free choice whether or not to appear. See, Folk and Moyer *Sequestration in Delaware: A Constitutional Analysis*, 73 Col. L. Rev. 749 (1973).

The Delaware Supreme Court, while acknowledging that "[s]uch a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right" (App. A, A3-A4) nonetheless upheld its constitutional validity, essentially on the authority of a decision rendered by this Court fifty-five years ago in *Ownbey v. Morgan*, 256 U. S. 94 (1921). That case in effect assumed the validity of Delaware's foreign attachment statute which provided for substantially the same procedure at law as the sequestration statute provides in equity. This Court there held that requiring a non-resident defendant to post special bail before permitting him to make a general appearance and secure release of the

3. All emphasis herein is added unless otherwise stated.

attachment did not offend due process. Mr. Justice Pitney, speaking for the Court, found this procedure to have been derived from settled usage in England and the Colonies and not in conflict with any specific provision of the Constitution, and said:

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, *cannot be deemed inconsistent with due process of law*, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of the proceeding *quasi in rem* into an action *in personam;* ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition. . ." (256 U. S. at 111)

Ownbey v. Morgan is plainly a relic from another age.[4] As the Court of Appeals for the Third Circuit recently put

4. Judge Gibbons, concurring in *Jonnet v. Dollar Sav. Bank*, 530 F. 2d 1123 (3rd Cir., 1976) at page 1136, said that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921." One commentator has described it as "one of the more egregious injustices of modern times." Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337, 379 (1961). Even contemporary comment on *Ownbey v. Morgan* suggested that the rule on which it was based had no place in modern jurisprudence:

> "It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from

it, "°°°*Fuentes, Mitchell* and *Di-Chem* cast serious doubt on *Ownbey's* current strength." *Jonnet v. Dollar Sav. Bank,* 530 F. 2d 1123, 1128 (3rd Cir., 1976). Nevertheless, references to *Ownbey* appear in the opinions of this Court in both *Fuentes* and *Sniadach* and in Mr. Justice Powell's concurring opinion in *North Georgia Finishing.* (407 U. S. at 97; 395 U. S. at 339; 419 U. S. at 610). Additional references in the same context are found in *Astol Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U. S. 663, 679 (1974) and in *Mitchell v. W. T. Grant Co.,* 416 U. S. 600, 613 (1974), both of which involved the validity of certain prehearing seizure procedures.

After reviewing this Court's references to *Ownbey* in those cases, the Delaware Supreme Court concluded that it continued to be viable authority for the validity of attachments without notice and hearing necessary to secure jurisdiction of a state court (App. A, A9-A11). In doing so, it relied heavily on this Court's citations of *Ownbey* in connection with the exception for so-called extraordinary situations (see p. 6, above), particularly the following footnote in *Fuentes:*

> "Of course, outright seizure of property is not the only kind of deprivation that must be pre-

4. (Cont'd.)

> other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever." Comment, 19 *Mich. L. Rev.* 583, 854 (1921).

And as this Court put it in *Sniadach:*

> "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." (395 U. S. at 340). See also, Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 Yale L. J. 1023 (1973).

> ceded by a prior hearing. See, e.g., *Sniadach v. Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co. v. Bennett,* 277 U. S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan,* 256 U. S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey. McKay v. McInnes,* 279 U. S. 820. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach v. Family Finance Corp., supra,* at 340; *id.* at 344 (Harlan, J. concurring)." 407 U. S. at 91; see also 416 U. S. at 679)

But this Court's reasoning in the opinion in *Fuentes* and its progeny is wholly inconsistent with the interpretation Delaware has given to this footnote and the related citations of *Ownbey.* In the *Fuentes* opinion this Court explicitly stated:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. *Boddie v. Connecticut,* 401 U. S. at 379. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for

a prior hearing. ° ° ° Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

"The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. ° ° °

". . . state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." (407 U. S. at 90-93). See also, *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. at 679.

The Delaware sequestration procedure is not limited to extraordinary situations. By its terms it is available to *any* private plaintiff who files an action in Delaware on *any* claim against *any* non-resident defendant, so long as that defendant happens to own securities issued by any Delaware corporation or other property which the Delaware court considers subject to seizure.[5] Thus what the Delaware court has chosen to clothe in the protective mantle of the "extraordinary situation" is nothing but the routine acquisition in a private dispute of in personam

5. In view of the large number of corporations incorporated in Delaware, and the fact that their securities are widely held by the public, there are potentially hundreds of thousands, if not millions of persons who are subject to Delaware's sequestration process (a process which is not restricted to officers or directors but runs against any non-resident shareholder).

jurisdiction over non-resident defendants—an ordinary procedural step which occurs daily in countless law suits.

We accept for purposes of the argument that a state may have a "basic and important public interest" in enabling its residents to have a remedy against non-resident defendants. Long-arm statutes by which such defendants may be subjected to in personam jurisdiction serve that purpose eminently—whatever may have been the need for other procedures such as sequestration in the past, it is anything but compelling now that long-arm statutes are available. But the exercise of jurisdiction under long-arm statutes is of course subject to the due process requirements enunciated in *International Shoe*. Delaware apparently tries to evade these due process requirements by using sequestration rather than long-arm service, but there is no reason why it should be permitted to do so.[6] See, Folk and Moyer, 73 Col. L. Rev. at 765-768.

We submit that the time is ripe for this Court to lay the ghost of *Ownbey* to rest and end the wide-spread confusion and uncertainty which pervades this important branch of the law. See, *Jonnet v. Dollar Sav. Bank*, above; *Carey v. Sugar, et al.*, – U. S. –, 44 L. W. 4416 (Mar. 25, 1976); *Hutchison v. Bank of No. Carolina*, 392 F. Supp. 888 (M. D. N. C. 1975); *Garcia v. Krausse*, 380 F. Supp. 1254 (S. D. Tex. 1974).

II.

The instant case, aside from focusing on the compelling need to clarify the status of *Ownbey*, raises the im-

6. Indeed it is doubtful that the Constitution permits Delaware to exercise even jurisdiction over a non-resident's property alone in the absence of contacts sufficient to satisfy the *International Shoe* test with respect to its owner. See, *Jonnet v. Dollar Sav. Bank*, above, 530 F. 2d 1123, 1130-1143 (Gibbons J., concurring); *Hanson v. Denckla*, 357 U. S. 235, 251, 253 (1958); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, 312-313 (1950).

portant question whether sequestration procedures such as Delaware's can in any case be squared with the principles and rules laid down by this Court in the *Sniadach, Fuentes* and *Di-Chem* line of cases.

To begin with, the court below considered all of those cases distinguishable because they "involved prejudgment seizures . . . for the purpose of collecting moneys claimed to be owed. . . . All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction. . . ." (App. A, p. 15). But as *Mitchell* makes clear, the claim to the attachment remedy by a creditor who, by reason of having sold the defendant the goods subject to seizure, retains some interest in those goods, is stronger than that of someone like the plaintiff here who, lacking any interest in or claim to property of defendant, simply seizes it to acquire jurisdiction. See 416 U. S. at 604. See, also, 407 U. S. at 84.[7] Accordingly, if this Court's prior decisions are distinguishable, they are distinguishable only in the sense that they presented a *less* compelling case for protection under the due process clause than this case.

Moreover, the purpose of the seizure cannot immunize it from scrutiny under the due process clause. On the contrary (as pointed out above), attempts to acquire jurisdiction over non-residents bring into play the additional due process limitations mandated by *International Shoe*, namely, that any assertion of jurisdiction must satisfy traditional notions of fair play and substantial justice. In this case, none of the individual defendants resides in Delaware and none has, or has been shown to have, any contacts with Delaware satisfying the *International Shoe* test. Accordingly, none would be subject to personal jurisdiction even had he been properly served under a long-arm statute.

7. *Fuentes*, for example, involved the seizure of goods sold by plaintiff to defendant under a conditional sales contract (407 U. S. at 86). In *Mitchell*, plaintiff had a vendor's lien on the seized goods to secure payment of the purchase price (416 U. S. at 604).

The court below sought to brush *International Shoe* aside as inapplicable on the stated ground that

> "jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendant with this forum." (App. A, p. 7)

But the important questions raised by this case cannot be disposed of by resort to labels. The undisputed fact is that Delaware resorts to sequestration for the purpose of acquiring personal jurisdiction over defendants. This Court has made it clear that where it is fundamentally the assertion of in personam jurisdiction which is at stake, *International Shoe* controls:

> "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co. v. Washington*, 326 U. S. 310, 319. * * * . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington*, 326 U. S. 310, 319." *Hanson v. Denckla*, 357 U. S. 235, 251, 253 (1958). See, Folk and Moyer, 73 Col. L. Rev. at 784-789.[8]

8. In the Delaware Supreme Court plaintiff made the alternative argument that defendants had sufficient contact with Delaware to satisfy the requirements of due process. This argument was, of course, irrelevant, since no attempt has been made to acquire in personam jurisdiction over these defendants. There has been no

The Delaware court's reasoning, which implies that jurisdiction may be coerced where it may not be acquired by conventional process, cannot withstand constitutional analysis for at least two additional reasons: first, because there is here in fact no property within the jurisdiction on which in rem jurisdiction could be founded, and, second, even if there were, the Delaware court, by seizing property and disposing of it without a hearing unless defendant makes a general appearance, does not exercise legitimate quasi in rem jurisdiction.

First, Delaware's purported seizure of the capital stock owned by defendants is premised on the fictional situs which Delaware law assigns stock issued by Delaware corporations (8 Del. C. § 169).[9] In fact, none of the certificates held by any of the defendants was seized. Those certificates, remaining in the hands of their owners, are negotiable instruments under Delaware law (6 Del. C. §§ 8-102, 8-105, 8-301); a good faith purchaser who ac-

8. (Cont'd.)
service of a summons on them, and Delaware has no long-arm statute. Plaintiff's contention there that the individual defendants might have been made subject to in personam jurisdiction in Delaware simply by reason of being directors or officers of employees of The Greyhound Corporation—even if there were a long-arm statute, and even if such service had been attempted—would still be without merit. See *Weller v. Cromwell Oil Company*, 504 F. 2d 927 (6th Cir. 1974); *Wilshire Oil Company of Texas v. Riffe*, 409 F. 2d 1277, 1281 (10th Cir. 1969); *Wagman v. Astle*, 380 F. Supp. 497, 499 (S. D. N. Y. 1974); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 841 (E. D. N. Y. 1971).

9. Examination of the Commercial Codes of the various states discloses that fifty-one jurisdictions have adopted Section 8-317 of the Uniform Commercial Code which provides that no attachment of shares of stock shall be valid "until the security is actually seized by the officer making the attachment." Delaware alone has modified that section by an amendment under which "the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." 8 Del. C. § 169.

quires the certificate would acquire good title to the shares it represents; and, of course, the state in which the certificate is located can seize it by attachment or other appropriate process, regardless of Delaware's sequestration. Accordingly, the purported seizure of defendant's stock is wholly inconsistent with accepted notions of quasi in rem jurisdiction and the applicable due process principles (See the excellent discussion on this point by Judge Gibbons concurring in *Jonnet v. Dollar Sav. Bank*, p. 1139).[10]

Second, even if one assumed the existence of quasi in rem jurisdiction over the stock owned by defendant, Delaware's procedure could not be justified as an exercise of such jurisdiction. It bars any hearing on the rights of the parties to the property and precludes the defendant altogether from appearing to litigate and defend the quasi in rem proceeding. To put it differently, Delaware's procedure offers only a choice between unilateral summary seizure or in personam litigation not limited to the seized property based on the defendant's coerced general appearance.

The existence of quasi in rem jurisdiction does not sanction a procedure which conditions the owner's right to defend his property on his consent to the conversion of quasi in rem to in personam jurisdiction. Cf. *Terral v. Burke Const. Co.*, 257 U. S. 529 (1922). If Delaware were to exercise legitimate quasi in rem jurisdiction, it would necessarily afford the owner of the property an

10. The purported exercise of quasi in rem jurisdiction on the basis of the fictional situs of stock, where the certificates are physically located outside of the state, has never been approved by this Court under the due process clause. *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1932) and *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1 (1900), cited by the court below (App. A, pp. 23-24) did not involve or deal with that issue. That its validity is at least subject to substantial doubt is well demonstrated by Judge Gibbons' opinion in *Jonnet v. Dollar Sav. Bank*, pp. 1132-1139. And see, *Western Union Co. v. Pennsylvania*, 368 U. S. 71, 75 (1961).

unconditional opportunity to be heard and would limit any judgment in the proceeding to the property involved.[11] That of course is not what it does—on the contrary, it permits the summary seizure of property under conditions which make the owner's deprivation of his property rights far more grievous than those in *Sniadach, Fuentes* and *North Georgia Finishing*. See, Folk and Moyer, 73 Col. L. Rev. at 789-795.

III.

Even if it could be said that the application of the Delaware sequestration procedure were limited to so-called "extraordinary situations", permitting seizure without a prior hearing, and even if its coercive features, which themselves offend due process, were ignored, the procedure would still have to provide sufficient safeguards to meet the requirements of the due process clause. See, *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 606; *Fuentes v. Shevin*, 407 U. S. at 67.

The court below acknowledged the requirement for adequate safeguards and enumerated those it thought to exist under the Delaware procedure (App. A, pp. 15-20). Upon analysis, however, the provisions enumerated by the court are revealed as providing no safeguards at all.

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11. Federal courts have long recognized this distinction between quasi in rem and in personam jurisdiction and have accordingly generally limited the power of a court to enter judgment in a quasi in rem proceeding to the value or the amount of the seized property. See, *Minichiello v. Rosenberg*, 410 F. 2d 106, 111 (2nd Cir. 1968), *cert. denied*, 396 U. S. 844 (1969); *Farrell v. Piedmont Aviation, Inc.*, 411 F. 2d 812 (2nd Cir. 1969); *Podolsky v. Devinney*, 281 F. Supp. 488 (S. D. N. Y. 1968); *Dry Clime Lamp Corp. v. Edwards*, 389 F. 2d 590, 595-598 (5th Cir. 1968); see, also, *Simpson v. Leohmann*, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669, 671 (1967), *rearg. denied*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319, 320 (1968).

(1) The court states that a court order is required for sequestration, but Delaware law gives the court no discretion to deny an application for a writ; a litigant is entitled to it as a matter of right. The trial court in its opinion denying appellants' motions stated in this respect:

> "The sequestration statute contains no provision for a review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), *aff'd sub nom., Breech v. Hughes Tool Co., supra.*" (App. B, A34).

In the cited decision of *Trans World Airlines, Inc. v. Hughes*, 40 Del. Ch. 523, 528, 185 A. 2d 762, 765 (Ch. 1962), *aff'd sub nom., Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A. 2d 428, 431-432 (Sup. Ct. 1963), Vice Chancellor Marvel held:

> "Upon application for an order of sequestration Hughes Tool Company was required by court rule to establish that the non-resident Mr. Breech not only owned property in Delaware but that the other requirements of the application statute and rule had been met. This having been done, *an order of sequestration issued as a matter of course. It will not be quashed merely because*

> *the charges made* against Mr. Breech *may be insubstantial.*" (40 Del. Ch. at 528, 185 A. 2d at 765).

And the Delaware Supreme Court said, affirming that decision:

> "It has never been suggested, so far as we know, that the use of this process by a litigant is controllable by the court's discretion. We think that *he is entitled to it as a matter of right, just as he is entitled to a writ of summons.*" (41 Del. Ch. at 134, 189 A. 2d at 432).

In view of these statements of the law, to imply, as the opinion below does, that the signature of a judge, rather than a clerk, on the order gives rise to the kind of "control of the process" which this Court found to satisfy due process in *Mitchell* is ludicrous. *Cf. Mitchell v. W. T. Grant Co.*, 416 U. S. at 625 (Mr. Justice Powell concurring); *Carey v. Sugar, et al.*, 44 L. W. at 4417. Quite the contrary, Delaware's procedure is more accurately described by the Court's words in *Fuentes:*

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure." (407 U. S. at 93, see also 91).

(2) The court states that the property to be seized must be identified with reasonable certainty. It is difficult to see how this would protect a defendant's due process

rights, but in any event the instant order of sequestration states, in this respect, that the sequestrator is to seize

> "property of the defendants in the State of Delaware, consisting of common stock, 3% Second Cumulative Preference [sic] Stock, stock unit credits, of the Greyhound Corporation and all options and all warrants to purchase the common or preferred stock of said corporation issued to the defendants and all contractual obligations, rights, debts or credits due or accrued to or for the benefit of any of said defendants under any type of written instrument, contract or other legal instrument of any kind whatever between any of the defendants and said corporation . . ." (Doc. 5 in Court of Chancery record)

This recital does not identify property to be seized—it is a dragnet clause, pure and simple.

(3) The court states that "the value of the property seized must be reasonably related to the amount of the claim asserted." However, there is no such requirement in the statute; [12] the court has no discretion to deny a writ on this ground (as established by the cases cited at p. 17 above); there is no procedure available under the statute by which a defendant could even raise the issue without having first made a general appearance; and nothing in the record reflects compliance with any such requirement.

12. The opinion in the *Hughes* case, cited by the court as its authority for the statement, does not support it at all as shown when the sentence from which the court quotes is read in its entirety:

> "Furthermore, *there is no limitation contained in Title 10 Del. C. § 366 as to the seizure of a non-resident's property* in Delaware, although, of course, the property so caused to be seized *should* always bear some reasonable relationship to the amount of the claim asserted." (185 A. 2d at 765)

(4) The court states that notice must be promptly given to a defendant after seizure, but since he has no right to a hearing on the merits of the seizure, such notice does little to protect his rights.

(5) The court states that defendant may appear to attack compliance with § 366, but this gives him the right only to raise issues concerning compliance with the technical requirements of the statute, and its constitutional validity. "There is no provision for an early hearing at which the . . . [plaintiff] would be required to demonstrate at least probable cause for the garnishment" (*North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 607), let alone for a hearing at which defendant can litigate the merits of plaintiff's claim without waiving his rights under *International Shoe*.[13] Without such provision, the statute plainly cannot withstand scrutiny under the Fourteenth Amendment.

(6) The court states that defendant may petition for release of the property and suggests that the court, in considering such a petition, may conduct a preliminary inquiry into the merits of the claim to determine whether the property should be released. But defendant can file such a petition only if and after he has submitted to personal jurisdiction; by then, the damage has been done—the seizure has been accomplished and the defendant has been coerced into making a general appearance in order to gain access to the court to make such a petition. The right to

13. In *North Georgia Finishing Inc.*, the Court struck down Georgia's garnishment statute because it barred challenge of the garnishment without the prior filing by the debtor of a bond. Delaware's sequestration statute presents the a fortiori case because it bars a challenge without the prior general appearance by the defendant, obviously a more risky and costly step than merely filing a bond.

file such a petition so conditioned obviously does not cure the constitutional defect of the statute.[14]

(7) The court states that after the defendant has made a general appearance, no new causes of action may be added to the complaint. But again, this limitation does not diminish the concededly coercive operation of the procedure which offends due process. See, *Tenney v. Jacobs*, 43 Del. Ch. 526, 528-529, 240 A. 2d 138, 139 (Sup. Ct. 1968).

(8) The court states that while the property is seized, the owner may sell it or otherwise deal with it so long as all proceeds are deposited with the sequestrator, but this provision does not lessen the deprivation and coercion inherent in the procedure—surely seizure does not become acceptable by giving the defendant the right to substitute other property.

IV.

Finally, the court below stated that Delaware's procedure "promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action." (App. A, p. 22). But this Court has consistently refused to allow Constitutional rights to be sacrificed at the altar of efficiency and economy:

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken.

14. It is clear, moreover, that the availability of a quick release provision would not in any event cure a prior unconstitutional deprivation of property rights. See, *Fuentes v. Shevin*, 407 U. S. at 84-86; *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U. S. at 601.

'The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.' *Stanley v. Illinois,* 405 U. S. 645, 656." *Fuentes v. Shevin,* 407 U. S. at 90-91, n. 22.

CONCLUSION.

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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Dated: June 15, 1976.

APPENDIX A.

OPINION.

132, 1975.

THE GREYHOUND CORPORATION, ET AL.,
Defendants Below, Appellants,

v.

ARNOLD HEITNER, AS CUSTODIAN FOR MARK ANDREW HEITNER,
Plaintiff Below, Appellee.

Argued: October 15, 1975

Decided: April 15, 1976

Before DUFFY and McNEILLY, *Justices,* and TAYLOR, *Judge.*

Upon appeal from the Court of Chancery. Affirmed in part.

Richard F. Corroon and Richard E. Poole, of Potter Anderson & Corroon, Wilmington, for defendant-appellant The Greyhound Corporation.

Max Terry, Jr., of Terry, Terry & Jackson, Dover, and William W. Schwarzer and Lynn H. Pasahow, of McCutchen, Doyle, Brown & Enersen, San Francisco, for individual defendants-appellants.

Joshua M. Twilley, of Twilley, Jones & Feliceangeli, Dover, and Michael F. Maschio and Carol Faye Simkin, of Cowan, Liebowitz & Latman, P. C., New York City, for plaintiff-appellee.

DUFFY, *Justice.*

The single question at issue in this appeal is the constitutionality of the Delaware Sequestration Statute and the related procedures thereunder. In our view, they do not violate due process of law requirements and, accordingly, we affirm the judgment of the Court of Chancery.

I.

The Sequestration Statute, 10 *Del. C.* § 366, has been an integral part of our law since 1927.[1] 35 *Del. L.* ch. 217;

1. In its present form 10 *Del. C.* § 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for

Sands v. Lefcourt Realty Corporation, Del. Supr., 117 A. 2d 365 (1955). Over the years since then a long line of cases has established the purpose of the Statute, its rationale and the procedure thereunder. Reference is made to those cases for a full definition of such matters.[2]

In *Ownbey v. Morgan,* 256 U. S. 94, 41 S. Ct. 433 (1921), the United States Supreme Court held that the Delaware foreign attachment statute was constitutional and, since the equitable remedy under § 366 is analogous to foreign attachment, *Sands v. Lefcourt Realty Corporation* supra, it is fair to say that *Ownbey* has been long regarded by the Court of this State as authority for the constitutionality of the Sequestration Statute. Cf. *Wiley v. Copeland,* Del. Supr., 349 A. 2d 211 (1975); *Gordon v. Michel* supra.

By its nature a foreign attachment, whether legal or equitable, involves a prejudgment seizure of property as a basis for jurisdiction and/or as a source of satisfaction for any judgment ultimately awarded on the merits of the claim. Such a proceeding has the seeds if not the fruits of

1. (Cont'd.)

the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

2. See, for example, *Sands v. Lefcourt Realty Corporation* supra; *Greene v. Johnson,* Del. Supr., 99 A. 2d 627 (1953); *Loft, Inc. v. Guth,* Del. Supr., 19 A. 2d 721 (1941); *Gordon v. Michel,* Del. Ch. 297 A. 2d 420 (1972); *Trans World Airlines, Inc. v. Hughes Tool Company,* Del. Ch., 187 A. 2d 350 (1962); *Cantor v. Sachs,* Del. Ch., 162 A. 73 (1932); Folk, *The Delaware General Corporation Law,* p. 565.

unfairness in permitting the impounding of property before judgment and, under some circumstances, upon thin assertions of right. But, as the discussion by Justice Pitney in *Ownbey* demonstrates, the practice traces its origin to early colonial days and, indeed, beyond them to the "custom of London." In law, however, as in the life it reflects, what is old is not necessarily good. Neither, we hasten to add, is it necessarily bad. But, as we are often reminded, due process concepts involve evolving standards of fairness and so the test for constitutionality is necessarily dynamic. Much has been decided and written about such concepts in recent years including their implications for Delaware sequestration procedures. See, for example, the thoughtful study by Folk and Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973).

For present purposes the current due process standards must largely be distilled from a quartet of decisions by the United States Supreme Court, all of which involved prejudgment seizures of property; they are: *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, – U. S. –, 95 S. Ct. 719 (1975); *Mitchell v. W. T. Grant Company*, 416 U. S. 600, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820 (1969).

Those decisions provide a foundation for renewed constitutional attack upon the Sequestration Statute. The argument seems first to have been made in the Court of Chancery in *Gordon v. Michel* supra, but it was rejected as the Court concluded that *Ownbey* remained viable and that 10 *Del. C.* § 366 still passed constitutional muster. Following *Gordon* other Chancery decisions reached the same result. Then in *Wiley v. Copeland* supra this Court, in a brief *per curiam* opinion, found § 366 constitutional on the same rationale announced in *Gordon*.

This appeal came on for hearing shortly after *Wiley* was decided but we permitted full exploration of the issues in briefing and at oral argument because of the important questions involved, and because certain arguments are made herein which were not fully answered in *Wiley*.

Against that background, we now focus on this appeal.

II.

This is a stockholder's action, derivative in character and brought on behalf of The Greyhound Corporation (Greyhound) against some twenty-eight individuals (defendants) including directors of Greyhound (or its corporate predecessors) who served at various times between 1957 and 1974. The complaint alleges that Greyhound suffered significant loss and damage as a result of conduct by defendants which is said to have caused Greyhound to be found (by the United States District Court for the Northern District of Illinois) in violation of certain antitrust laws. The complaint also attacks the distribution of benefits under Greyhound's deferred compensation and stock option plans.

None of the defendants is a Delaware resident, all were served under the Sequestration Statute and relevant Rules of the Court of Chancery. Apparently, the Court-appointed Sequestrator seized certain Greyhound shares of stock and/or contract rights which defendants, respectively, had under agreements with Greyhound. The Court of Chancery denied both a motion by the individual defendants to dismiss the complaint for lack of jurisdiction and a motion by all defendants to vacate the order of sequestration. This appeal followed.

III.

The thrust of defendants' argument is that the sequestration procedure is inconsistent with controlling constitu-

tional principles. They say that the procedure, including that which obligates them to appear generally before defending on the merits, violates their right to due process of law.

Defendants argue that the minimum contacts requirements of *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), must be met before *personam* jurisdiction is assumed and they say that they are entitled to a meaningful right to be heard under *Boddie v. Connecticut*, 401 U. S. 371, 91 S. Ct. 280 (1971), before their property may be seized. And, they continue, the passage of time and changing concepts of due process "have rendered *Ownbey* obsolete."

A.

There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company*, Del. Supr., 189 A. 2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing*, Del. Super., 324 A. 2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del. C.* § 169 [3] the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial

3. 8 *Del. C.* § 169 reads in full as follows:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York*, 288 U. S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Cooper Min. Co.*, 177 U. S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U. S. Industries, Inc. v. Gregg*, D. Del., 348 F. Supp. 1004 (1972).

We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe*.

As to *Boddie*, we agree that it contains an important summary of due process requirements, including a "meaningful opportunity" to be heard before one is deprived of any significant property interest. But the implications of *Boddie* for this appeal may best be understood, not by reference to its general principles but in light of an analysis of *Sniadach, Fuentes, Mitchell* and other cases dealing with foreign attachments. And now we turn to those cases.

B.

In *Sniadach*, decided in 1969, the Supreme Court invalidated on due process grounds a Wisconsin statute which authorized garnishment of wages, at the request of a creditor's lawyer, before trial without any opportunity for the wage owner to be heard or to tender a defense. In the absence of "notice and a prior hearing," said the Court, the procedure was deemed unconstitutional. But, writing for the Court, Justice Douglas recognized an *Ownbey* exception in so many words; after referring to seizure without notice or hearing he said:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations . . . . *Ownbey v. Morgan*. . . ." 395 U. S. at 339, 89 S. Ct. at 1821.

Some three years later the Court decided *Fuentes*, in which it invalidated Florida and Pennsylvania prejudgment replevin statutes applied to household goods sold under conditional contracts. The statutes denied the purchasers the opportunity to be heard before seizure and that, said the Court, violated due process, in each instance. The writ issued on bare assertions of right and in neither State was a judge involved. Speaking for the Court, Justice Stewart said:

> "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . ." 407 U. S. at 97, 92 S. Ct. at 2002.

But, citing *Boddie*, he stated that there "are 'extraordinary situations' that justify postponing notice and opportunity for a hearing"; and he added a footnote, saying:

> "In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Brothers & Co. v. Bennett*, 277 U. S. 29, 48 S. Ct. 422, 72 L. Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837." *Fuentes v. Shevin* supra 407 U. S. at 91, 92 S. Ct. at 1999, n. 23.

Two years later the Court decided *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 94 S. Ct. 2080 (1974), in which, citing *Fuentes*, *Sniadach* and *Boddie* it again found and applied in Justice Brennan's language "one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." In applying the "limited circumstance" test stated in *Fuentes*, he noted that the seizure (of a yacht) served a significant governmental purpose by permitting Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings; the following footnote was cited to that quotation, again implicitly approving *Ownbey:*

> "Cf. *Ownbey v. Morgan*, 256 U. S. 94, 65 L. Ed 837, 41 S. Ct. 433, 17 ALR 873 (1921), cited with approval in *Fuentes v. Shevin* supra, at 91 n. 23, 32 L. Ed. 2d 556."

It seems clear from the writing of three different Justices in the above three cases that until May 15, 1974 *Ownbey* was still viable for some purposes; indeed, all three had referred to the case by name, with explicit or implicit approval.

The next case in time, *Mitchell*, was also decided in 1974. There Justice White referred to prejudgment seizures approved under the special circumstances found in *Ewing v. Mytinger and Casselberry*, 339 U. S. 594, 70 S. Ct. 870 (1950) and then said,

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hear-

ing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit.' 'The fact that the execution is issued in the first instance by an agent of the State but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.' Coffin Brothers v. Bennett. . . . To the same effect was the earlier case of Ownbey v. Morgan. . . . Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. McKay v. McInnes, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1928).

. . .

The judgment of the Maine court was affirmed without opinion citing *Ownbey* and *Coffin.*" *Mitchell v. W. T. Grant Company* supra, — U. S. at —, 94 S. Ct. at 1903.

While the Court's discussion of *Ownbey* is arguably less than explicit approval, it seems clear that it was not overruled and, indeed, in our view the Court looked to it as precedent for approval of the Louisiana sequestration statute in *Mitchell.*

In 1975 the Court decided *North Georgia Finishing, Inc. v. Di-Chem, Inc.* supra, in which it invalidated a Georgia garnishment statute that permitted prejudgment seizure of property on an affidavit of plaintiff or his attorney. The Court noted that in *Fuentes*, Fourteenth Amendment violations were found "[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken

repossession" and, said Justice White for the Court, "[t]he Georgia statute is vulnerable for the same reasons." While his opinion does not refer to *Ownbey,* the concurrence by Justice Powell cites it as an illustration of "unanimously approved prejudgment attachment liens" under the "traditional view of procedural due process."

C.

While the significance of these decisions for foreign attachment statutes in the States is by no means complete, or clear, we can, we think, draw two inferences from what the Court has said about *Ownbey.* First, an attachment which is necessary to secure jurisdiction in a State court is an "extraordinary situation" under *Boddie. Fuentes* so holds in so many words (denoting it as "clearly a most basic and important public interest") and the same view is echoed in *Astol Calero-Toledo,* in *Mitchell* and by Justice Powell in his concurring opinion in *North Georgia.* The second inference is that, given an "extraordinary situation", pre-seizure notice and hearing are not required by the due process clause,[4] *Jonnet v. Dallas Savings Bank,* 3 Cir. — F. 2d — (1976). Those inferences seem reasonable and they are certainly addressed to the common sense of what is involved: prior notice of seizure would permit a defendant to divest the court of a jurisdiction which, by definition, it has over the *res*—he could simply take it out of the State or defeat jurisdiction by a transfer of title.

4. It is not clear whether the presence of adequate safeguards alone will comport with due process where there was no pre-seizure notice and hearing, or whether the safeguard procedure is available only under extraordinary situations as identified in *Boddie.* We need not decide the question because, for the reasons already stated, we think that the United States Supreme Court has said that *Ownbey* qualified under *Boddie* and so, inferentially, does § 366.

And a plaintiff would thus lose a right, which he would otherwise have, to take the case into court. We hold that § 366 is not unconstitutional because seizure precedes notice and hearing.

In *North Georgia* the Supreme Court based its ruling on the absence of "notice and . . . opportunity for a hearing or other safeguard." The disjunctive character of that quotation from Justice White supports our conclusion that prior notice and hearing are not mandated by the Fourteenth Amendment. But "other safeguards" are required if the sequestration procedure is to square with the Constitution. So we must now examine § 366 from that point of view. Precisely what requirements the Court has in mind for safeguards is not certain but some insight is available from what it has approved and what it has criticized. It has said, for example, that there must be a hearing and judicial determination "before one is finally deprived of his property," *Mitchell v. W. T. Grant Company*, supra. And in *North Georgia* the Court made a number of criticisms about the procedure, including the fact that the writ issued at the order of a clerk without participation by a judge, the affidavit was sufficient with conclusory allegations made by an attorney without personal knowledge of the facts, the debtor was deprived of the use of the property and there was no provision for an early hearing.

Since the requirements of due process "are not technical, nor is any particular form of procedure necessary," *Mitchell v. W. T. Grant Company* supra, we deem it unnecessary to litmus test Delaware sequestration procedure against every facet of the foreign attachment proceedings approved or invalidated in the governing cases we have reviewed. We review, rather, certain of the significant features of the Delaware procedure which seem relevant to the respective interests of the parties.

D.

As the Third Circuit said in *Jonnet*, a plaintiff has two interests in invoking foreign attachment procedures: to establish jurisdiction in the forum and to restrain a *res* within the control of the Court for eventual payment of a judgment. In Delaware the first of these is the principal and under most circumstances the exclusive basis for sequestration. Indeed, by its terms § 366 permits the "Court [to] . . . compel the appearance of the defendant by the seizure," a purpose underscored by the cases. Cf. *Sands v. Lefcourt Realty Corporation* supra; *Gordon v. Michel* supra.

On this point we pause to note, as did the Vice Chancellor, that *Sniadach, Fuentes, Mitchell* and *Georgia* all involved prejudgment seizures, by attachment proceedings, for the purpose of collecting moneys claimed to be owed. And so did the most recent decision by the Supreme Court on this question: *Carey v. Bert Randolph Sugar*, – U. S. –, – S. Ct. –, 44 L. W. 4416 (3/24/76). All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction which is what this appeal is all about.[5] While that difference may be determinative in distinguishing this case from creditor type cases, we do not base our conclusion on it.

As to safeguards or protection of a defendant's interest, the following appear significant to us:

(1) An order of Court is required to initiate the § 366 process and, beyond doubt, that requires an order of a Judge of the Court of Chancery who has control of the process at all times.

5. The statute permits seizure only if defendant is a non-resident. See § 366, *Wife v. Husband*, Del. Ch., 271 A. 2d 51 (1970). Compare *Astol Calero-Toledo v. Pearson Yacht Leasing Co.* supra.

(2) The property to be seized must be identified with reasonable certainty in the Court order.[6] *Cannon v. Union Chemical & Materials Corp.*, Del. Ch., 144 A. 2d 145 (1958). Compare *Baker v. Gotz*, D. Del. 336 F. Supp. 197 (1971); aff'd 492 F. 2d 1238; cert. den. 417 U. S. 955, 94 S. Ct. 3084 (1974).

(3) The value of the property seized must be reasonably related to the amount of the claim asserted.[7] *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), aff'd 185 A. 2d 886 (1962).

(4) Following seizure, notice thereof must be promptly given to defendant. § 366, Chancery Rule 4(db).

6. Chancery Rule 4(db) provides in part:

> "No order shall be entered under 10 *Del. C.* § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a nonresident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:
>
> (a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.
>
> (b) The following information as to the property of each such defendant sought to be seized:
>
> (1) A reasonable description thereof.
>
> (2) The estimated amount and value thereof.
>
> (3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.
>
> (4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.
>
> (5) The reason for the omission of any of the required statements."

7. Sequestration is available only when a money judgment is sought. *Steinberg v. Shields*, Del. Ch., 152 A. 2d 113 (1959).

(5) A general appearance is required before release of property seized, but under both the statute and the Chancery practice a defendant has a right to appear solely for the purpose of attacking compliance with § 366 and the Rules of Court.[8] *Schwartz v. Miner*, Del. Ch., 133 A. 2d 599 (1957). Indeed, defendants are doing that very thing here without having made a general appearance. If sequestration is determined to be valid, each defendant has an option to appear generally or not.[9] *Schwartz v. Miner* supra.

(6) After seizure a defendant who has entered a general appearance may petition for release of the property and the "Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

(7) A defendant who elects to appear generally after seizure will be called upon to litigate only those causes of action asserted against him in the original complaint; he may not be confronted with new causes of action. *Tenney v. Jacobs*, Del. Supr., 240 A. 2d 138 (1968); *Townsend Corporation of America v. Davidson*, Del. Ch., 181 A. 2d 219 (1962).

(8) While the property seized is in the control of the Court, a defendant does not lose all rights over it.

8. Such an appearance is made under Chancery Rule 12(b) by filing a motion to dismiss for lack of jurisdiction. In earlier days a "special appearance" was permissible for the same purpose. See, for example, *Whitman v. San Francisco Bay Toll Bridge Co.*, Del. Ch., 142 A. 783 (1928).

9. Discovery is available for the purpose of determining whether there has been an effective sequestration, cf. *Kolyba v. Banque Nationale de Paris*, Del. Ch., 316 A. 2d 585 (1973), but it may not be had for a fishing expedition to find property subject to seizure. *Chavin v. Gluck*, Del. Ch., 216 A. 2d 142 (1965).

Thus the sequestration order entered in this case, which follows what we understand to be the usual practice, states:

> "4. In the event that the defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as the defendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.
>
> "In the event that said Greyhound Corporation shall desire to make any payments under any agreements, contract or other legal instrument of any kind whatsoever between any of said defendants and said corporation being seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payment of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts, or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court."

In addition to those safeguards, we think that there is another (from a defendant's point of view) which has not been emphasized in the cases but which is implicit in § 366. The statute permits a defendant who has appeared generally to petition for release of seized property and

> "[t]he Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable pos-

> sibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

In order to make such a determination the Court of necessity must be informed not only of the value of the property seized but also of what effect release of the property will have on satisfaction of any judgment which plaintiff may secure. To know that, *i.e.*, what judgment may be secured, the Court must be informed about the possible amount of such judgment and, clearly, that means at least some preliminary inquiry into the merits of the claim. Cf. *Carey v. Bert Randolph Sugar* supra. Compare Vice Chancellor Marvel's 1969 ruling in *Trans World Airlines, Inc. v. Hughes* supra in which he said that ". . . of course, the property . . . seized should always bear some reasonable relationship to the amount of the claim asserted." Manifestly, the complaint or other statement by a plaintiff cannot be conclusive on the value or merits of the claim.

In sum, the sequestration procedure is at all times under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally; if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim.

In our view, § 366 and the related procedures provide a reasonable balancing of interests between plaintiff and defendants and assure to the latter the safeguards required under current guidelines established by the United States Supreme Court.

E.

Defendants argue also that compelling them to make a general appearance before defending on the merits violates their right to due process. They rely principally on decisions by Courts in New York holding that an obligation under a liability insurance policy may be a basis for jurisdiction over personal injury litigation, but liability of a non-resident defendant who appears is limited to the face value of the policy. *Farrell v. Piedmont Aviation, Inc.*, 2d Cir., 411 F. 2d 812 (1969); *Minichiello v. Rosenberg*, 2d Cir., 410 F. 2d 106 (1968), cert. den., 396 U. S. 844, 90 S. Ct. 69, 24 L. Ed. 2d 94 (1969); *Jarvik v. Magic Mountain Corp., S. D. N. Y.*, 290 F. Supp. 998 (1968); *Simpson v. Loehmann*, N. Y. App., 234 N. E. 2d 669 (1967); rearg. den., 238 N. E. 2d 319 (1968).

We do not regard the rationale of those cases as persuasive authority for the due process argument which defendants make here. As the cited cases indicate, the theory of suit and the practice thereunder spawned a considerable volume of Federal-State litigation which has apparently resulted in settled law in New York. But the attachment theory and the limited liability imposed on an appearing defendant have apparently been adopted only in New York. See *Ann.* 33 A. L. R. 3d 992. And even in New York the doctrine is limited to claims based on an insurance policy. Thus in *Simpson v. Loehmann* the New York Court of Appeals said:

> "This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even though he proceeds with the defense on the merits. Consideration of CPLR 320 (subd. [c])

and its effect in other types of action begun by attachment must, of course, await future cases." 238 N. E. 2d at 320.

We decline to proceed here on the basis of what New York alone has done in personal injury claims under insurance policies.

We agree with Judge Stapleton also when he said in *U. S. Industries*, 58 F. R. D. at 479, that there is a "legitimate public interest behind the general appearance rule"; it promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action. And, that is particularly desirable in the kind of controversy here involved. According to the amended complaint, this is essentially an intra-corporate dispute between a complaining shareholder, who sues for the corporation, alleging loss and damage resulting from conduct of defendants in their respective capacities as directors and/or officers of Greyhound. The charges are that defendants caused the Corporation to be in contempt of orders of the United States District Court for which substantial fines were imposed on Greyhound, caused Greyhound to violate the anti-trust laws, and unjustly enriched themselves through stock options and deferred compensation plans. Such a controversy surely has a substantial relationship to this forum, *Folk and Moyer* supra, and litigation here will eliminate the possibility of duplicate actions elsewhere with varying results.

We hold that § 366 is not unconstitutional because it requires defendants to appear generally before defending on the merits.

IV.

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of

security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del. C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U. S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

V.

Finally, we turn to the argument made by Greyhound Corporation, for whose benefit plaintiff alleges that he sues.

Greyhound says that the sequestration order deprives it of property without due process of law. It attacks that part of the order under which the Sequestrator directed it "not to transfer or permit to be transferred any of said shares of stock," (*i.e.*, the seized shares) except pursuant to Court order. Relying on *Haas v. Haas*, Del. Ch., 119 A. 2d 358 (1955), Greyhound argues that the individual defendants retain the power to pass good title to their shares to a good faith purchaser and that under the Uniform Commercial Code (6 *Del. C.* §§ 8-301, 8-102, 8-105) such a transferee would take title unaffected by the sequestration proceedings; and, Greyhound continues, it would be obliged to transfer the shares on its books or be

liable for any loss resulting from a refusal or a delay in doing so. 6 *Del. C.* § 8-401(2).[10]

The Vice Chancellor disposed of Greyhound's argument on the basis of the Uniform Commercial Code, 5A *Del. C.* § 8-317, which reads:

> "Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

He noted the priority of § 366 by the terms of the Uniform Commercial Code and suggested that Greyhound could find protection by complying with the sequestration order and § 8-317.

As to Greyhound's reliance on *Haas*, he said that the conflict there did not involve a sequestration order and UCC priorities, and that defendants remain free to transfer their stock under the order of sequestration and the general practice. Cf. *Trans World Airlines, Inc. v. Hughes Tool Company* supra.

In this Court Greyhound points to a number of situations in which it might be caught in a legal dilemma and be faced with a claim for loss. These all contemplate a transfer by a defendant in violation of the sequestration order or a claim by a bona fide purchaser who was made

10. 6 *Del. C.* § 8-401(2) provides:

> "Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer."

so by a defendant under circumstances which violate the order of sequestration.

None of such facts or claimants are before the Court.

We recognize the desirability of quieting fears about the free transferability of shares traded on a national stock exchange but we are not persuaded that that or any other reason advanced by Greyhound provides a basis on which this Court can or should state an opinion. In brief, there is not before us a controversy calling for a judicial judgment, even on a declaratory basis. Accordingly, we decline to decide the issue.

° ° °

Affirmed in all respects except as noted in Section V.

APPENDIX B.

Letter Opinion of Judge Brown

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

GROVER C. BROWN
Vice Chancellor

Court House
Georgetown, Delaware

May 12, 1975

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Re: Heitner v. The Greyhound
Corporation, et al.
Civil Action No. 4514
Submitted: November 26, 1974

Gentlemen:

This is a stockholders derivative suit brought against and for the benefit of The Greyhound Corporation, a Delaware corporation, as well as against various nonresident officers and directors of Greyhound. The individual defendants have moved specially to quash and vacate the sequestration order which seeks to compel their appearance in this Court and to thus dismiss the complaint against them. Greyhound has also moved to dismiss. I shall deal with their motions separately.

Because the plaintiff is also a nonresident and because the claims on which the complaint is premised allegedly involve wrongs to the corporation occurring outside this State, the individual defendants charge that the attempt to obtain personal jurisdiction over them through the Delaware sequestration statute constitutes an unconstitutional violation of due process. Defendants rest their position on three primary legal approaches, and, to a degree, the arguments tend to overlap each other. Because of this I feel it only fair to set forth what I perceive each separate thrust to be, with the expectation that if I have unfairly construed any one of them counsel will promptly advise.

The defendants concede that the sequestration statute, 10 *Del. C.* § 366, has been upheld against constitutional attack by the recent decision of this Court in *Gordon v. Michel*, Del. Ch., 297 A. 2d 420 (1972), and by our federal District Court in *U. S. Industries, Inc. v. Gregg*, D. Del., 348 F. Supp. 1004 (1972), and 58 F. R. D. 469 (1973). They suggest, however, that their particular arguments were not considered in *Gordon* and *Gregg* decisions misconstrue the operation of the sequestration statute and therefore should not be followed.

Pervading all of their arguments is the assumption that if the use of the sequestration process is upheld against them under the circumstances of this case, it would permit a nonresident plaintiff to compel the personal appearance of nonresident defendants in a Delaware court, (under the threat of a forfeiture of their property if they did not), by means of a prehearing seizure of property located outside this State based on a complaint which alleges wrongs also

occurring outside of this State. This, the defendants say, can in no way be sanctioned as a proper use of service of process in light of the decisions of the United States Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 556, 92 S. Ct. 1983 (1972), *Mitchell v. W. T. Grant Co.*, – U. S. –, 40 L. Ed. 2d 406, – S. Ct. – (1974), and their various precedential stepchildren. While the picture of the situation as painted by the defendants may evoke an initial wave of sympathy, I feel for reasons expressed hereafter that not all of the elements assumed by them are legally correct.

Also, in view of the recent wealth of judicial decision that has emerged from the swirling and infectious dust of *Sniadach* and *Fuentes*, I feel it appropriate to note a few distinctions at the outset. In the main those cases and their descendants dealt with suits between creditors and debtors wherein the ability of the plaintiff to obtain jurisdiction over the defendant was not in issue. In addition, while the terms "attachment" and "sequestration" stand for generally recognized legal concepts, their precise operational meaning in a given case may well depend on the purpose for which they are authorized by local statute or court rule. Compare, for instance, *Mitchell v. W. T. Grant Co., supra,* where in Louisiana "sequestration" was the process used for the prehearing seizure of specific property in which both the resident plaintiff and defendant claimed an ownership interest.

The primary purpose of "sequestration" as authorized by 10 *Del. C.* § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, "sequestration" is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him

in a court of equity. *Sands v. Lefcourt Realty Corp.*, Del. Supr., 177 A. 2d 365 (1955). It is accomplished by the appointment of a sequestrator by this Court to seize and hold property of the nonresident located in this State subject to further Court order. If the defendant enters a general appearance, the sequestered property is routinely released, unless the plaintiff makes special application to continue its seizure, in which event the plaintiff has the burden of proof and persuasion. 10 *Del. C.* § 366; Rule 4(db); and see *Gordon v. Michel, supra,* footnote 1.

Here, what has been sequestered is stock held by the individual defendants in Greyhound, a Delaware corporation. Its purpose is to induce such officers and directors to appear and defend the suit brought against them for the benefit of the corporation. The complaint alleges wrongs to the corporation for which the plaintiff wants them held accountable. The ultimate relief sought is unliquidated damages to the corporation which the plaintiff has the burden to establish. Plaintiff does not want to hold their refrigerators or automobiles pending a hearing; he does not even want to hold their stock at this point. He simply wants it held by an officer appointed by the Court so as to entice them to appear, subject to the condition that if they refuse to appear, and if the Court should thereafter be convinced from the proof that they owe damages to the corporation, so much of their sequestered stock as necessary may be sold to satisfy the obligation. With this recitation as to the function of "sequestration" as applied to this case, I turn now to what I understand to be the arguments of the individual defendants.

I.

First the defendants argue that their Greyhound stock cannot be validly seized by the sequestration order since it is not property actually located in Delaware. They

claim that of the 52 jurisdictions that have adopted the Uniform Commercial Code, all but Delaware provide that no attachment of any security or share is valid until the security is actually seized. While acknowledging that 8 *Del. C.* § 169 provides that the "situs of the ownership" of all capital stock of a Delaware corporation is regarded as being in this State for purposes of "title, action, attachment, garnishment and jurisdiction of all courts held in this State," they argue that this is a pure fiction. They say that Delaware has no "control" over the property seized, i.e., the stock certificates, as required by the venerable decision of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878), but rather it only has control over the corporation that issued the stock. They say that control of the corporation gives no control over the transfer of its shares by shareholders such as the individual defendants. They point out that this was expressly recognized by this Court in *Haas v. Haas*, Del. Ch., 119 A. 2d 358 (1955). Finally, they theorize, since Delaware's Uniform Commercial Code recognizes that a bona fide purchaser without notice acquires a clear title to stock upon delivery of the certificate, as did *Haas v. Haas* under the previous Uniform Stock Transfer Act, there can be no valid seizure of corporate stock unless the certificates themselves are within this Court's jurisdiction.

The *Haas* case, on which defendants place great reliance, involved a suit by a wife against both her husband and General Motors Corporation to compel shares of stock then registered in the husband's name as a result of his fraudulent actions to be reregistered in the joint names of the husband and wife. Prior to this suit the husband had pledged the stock to a Florida bank as collateral for a loan on which he became in default. The court issued a restraining order against the husband and General Motors but, as it noted, it "did not then obtain actual control of

the certificates." 119 A. 2d 360. Subsequent to the restraining order the husband directed the bank to sell the stock so as to pay off the loan, which the bank proceeded to do without knowledge of the Delaware Court proceedings which enjoined his right to transfer. General Motors refused to make the transfer because of the restraining order and the bank intervened as a defendant. Plaintiff sought to dismiss its petition for failure to state a claim, but this motion was denied by the Chancellor. He reasoned under the Uniform Stock Transfer Act (which was then in force) that where a transfer is made by a delivery of certificates and stock powers which are regular on their face, a purchaser without knowledge becomes a bona fide holder for value, and such status is not lost even though an action is pending and a restraining order against the transfer is outstanding. Thus he held that a claim had been stated.

From this the defendant would magically transform statutory rights which protect a bona fide purchaser for value under certain circumstances into the legal principle that the situs of the ownership interests in a Delaware corporation follow and depend upon the location of the stock certificate despite the language of 8 *Del. C.* § 169 to the contrary. I do not agree with this rationalization.

In adopting the Uniform Commercial Code, Delaware intentionally omitted the recommended language of the act which would have mandated the conclusion sought by the defendants. In addition, it was specifically provided that nothing in the Code should in any way affect the provisions of 8 *Del. C.* § 169 and 10 *Del. C.* § 366, among others. See 5A *Del. C.* § 8-317 and the comment thereto. This does not seem to be unreasonable. A shareholder owns a proportionate interest in his corporation which is represented by a stock certificate as well as being reflected on the corporate stock ledger.

Sequestration seeks to seize his ownership interest in the corporation, not merely his documentary indicia of ownership. Thus the fact that a shareholder has the right to transfer his ownership interest in the corporation to another by endorsement and delivery of the certificate offers no foundation for the proposition that the property interest represented by it departs this State's jurisdiction when the certificate crosses the border. Under this theory, a judgment debtor could avoid attachment of his auto, for instance, by simply mailing his title across the state line. Likewise, I presume, a stockholder who lost his certificate could not have his stock interest attached by any court, any where in the event he chose not to seek a new one.

Even in *Haas* it was noted that "for certain purposes such property [stock] has its situs in Delaware and the Uniform Stock Transfer Act does not alter this conclusion." 119 A. 2d 362. See also *U. S. Industries, Inc. v. Gregg* at 348 F. Supp. 1020 where it was observed that it is constitutionally proper for a state to provide "as Delaware has done," that the situs of the capital stock of its corporations is in the home state.

I cannot conclude that the sequestration of defendants' stock and stock interests is invalid here simply because the stock certificates themselves may be beyond the Court's jurisdiction.

II.

Secondly, defendants contend that sequestration is unconstitutional since it allows a seizure of their property without notice and with no provision whatever for a hearing as to the propriety of the seizure. While conceding for the purpose of this theory that *Gordon v. Michel, supra,* is at present dispositive of the need for notice and a hearing prior to the seizure of their stock, they argue that *Mitchell v. W. T. Grant Co., supra,* mandates that this is

permissible only if the defendant has available to him the means for a prompt and meaningful post-seizure hearing. They point out that under 10 *Del. C.* § 366 a nonresident defendant whose property has been sequestered cannot obtain a post-seizure hearing unless he first submits to *in personam* jurisdiction, and then the hearing to which he becomes entitled goes to the merits of the plaintiff's claim and his right to recover a personal judgment against him rather than to the justification for the sequestration in the first instance. They suggest that this amounts to no hearing at all on the seizure issue.

The short answer to this is that the authorities upon which defendants rely require a prompt hearing to determine whether or not the attachment was proper or if it should be dissolved and the property returned. Under 10 *Del. C.* § 366 the general appearance of the nonresident in the action authorizes him to petition for the immediate release of his property, and a hearing becomes necessary only if the plaintiff opposes this release in an effort to establish some assurance of payment for the judgment he hopes to recover. Thus, under Delaware sequestration, the property can be released from the attachment or a hearing initiated, if necessary, just as soon as the defendant chooses to appear. Assuming arguendo that it is proper to compel his appearance in this manner, then the promptness with which the sequestration is terminated or a hearing convened lies, in the first instance, in the hands of the defendant. Consequently, I cannot conceive that that the failure of either the statute or the Court rules to specifically require a hearing after the seizure is fatal under the rationale of *Mitchell.* (Defendants contend that it is not proper to compel their personal appearance in this way even if they do have attachable property interests in Delaware, but a discussion of this aspect of their motion is best suited for another segment hereof.)

Defendants further argue that under *Fuentes* and *Mitchell* three elements are necessary to constitutionally justify the omission of a pre-seizure hearing, regardless of its purpose. They suggest that these three elements are (1) a legitimate state interest, (2) a need for prompt action and (3) strict control by the state over the monopoly of its legitimate force. Their argument on the need for prompt action is bottomed on their assumption that stock ownership interests are not attachable where the stock certificates themselves are beyond the reach of the Court's jurisdiction. Since this theory has been rejected, there is no need to deal with it further here.

The argument as to a legitimate state interest also relies to a degree on this non-reachable property theory, and likewise loses this measure of its force. In addition, defendants urge that there can be no legitimate state interest such as sanctioned in *Gordon v. Michel* where the plaintiff is also a nonresident and where the cause of action arose outside the state. In *Gordon* it was held that the "interest of a state in aiding *its citizens* in prosecuting claims against nonresident defendants with property in the state has long been recognized." 297 A. 2d 422. (Emphasis added.) But, defendants argue, this protective justification does not hold true where the plaintiff is not a citizen of the state.

In this approach, however, it seems to me that the defendants unfairly characterize the suit as an attempt by one nonresident to use the Delaware courts and sequestration process to recover a damage claim against other nonresidents. If this was all there was to it, their objection might be more persuasive. What this characterization overlooks, however, is that this is a derivative action brought to redress wrongs allegedly committed on a corporation which is a creature existing in, under and by virtue of Delaware and its corporate laws. A rectification

of any such wrongs and an appropriate recovery would benefit all stockholders of this Delaware entity, not just the plaintiff stockholder. As stated in *Gordon v. Michel* at 297 A. 2d 422:

> "There is, indeed, a particular valid governmental interest in compelling appearance in a derivative suit in this jurisdiction because the corporation is organized here, an action can always be brought here for its benefit and the regulation of its internal affairs is governed by Delaware law. Speaking generally, a director or officer defendant should be obliged to respond in this jurisdiction which is in a unique position to make an authoritative determination of 'housekeeping' issues and to grant complete relief."

This being true, why should the interest of Delaware in the management and proper operation of its corporate entities be any less simply because the derivative suit is initiated by a nonresident stockholder as opposed to a resident stockholder? Or because the acts and decisions of management which are complained of actually took place in Illinois rather than in New Castle County? In view of the derivative nature of the suit, I do not feel that the fact that the plaintiff-stockholder here is a nonresident and that the alleged wrongs occurred in another jurisdiction distinguish this situation from *Gordon v. Michel* so as to hold the prehearing sequestration unconstitutional under the authorities cited.

As to the element of strict control by the state over its attachment processes, defendants point out that *Mitchell v. W. T. Grant Co.* was decided after *Gordon v. Michel*, and that consequently this Court has not considered *Mitchell's* requirement that there be provision for

review by a judge or other state official of sufficient authority to determine if a summary seizure without notice is appropriate before such a prehearing attachment can validly issue. They insist that the Delaware sequestration process cannot pass this test. Their reasoning runs as follows.

The sequestration statute contains no provision for review by this Court as to the necessity for its use. By case precedent it is established that a plaintiff is entitled to sequestration as a matter of right as long as his application meets procedural formalities. If the application is formally sound, this Court has no discretion to deny this right. *Breech v. Hughes Tool Co.*, Del. Supr., 189 A. 2d 428 (1963). Nor does the Court have the power to first consider the merits of the claim as a condition to authorizing sequestration. *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), aff'd sub nom, *Breech v. Hughes Tool Co., supra.* Thus, it is argued, this Court has no power to prevent the summary use of its sequestration process by an individual and consequently the Delaware procedure lacks the element of judicial control found necessary in *Mitchell* to support a prehearing seizure without notice.

Again, however, I feel that the purpose of Delaware sequestration must be distinguished from an attachment process which enables a plaintiff to seize property held by another pending a trial on the issue of who has the right to keep it. In this latter case, as indicated by Mitchell, there is a need to have a proper authority review the application to evaluate whether there is probable merit to the claim as well as a danger that the property will be removed or dissipated if notice is first given. These same considerations are present in applications for immediate injunctive relief without notice. A procedure which

leaves this determination to the interested plaintiff cannot pass constitutional muster as the recent trend of decision illustrates.

Here, however, the purpose is to compel the appearance of a nonresident who has property within this State. In order to establish the necessity for service by sequestration, there must be a showing that the defendant is a nonresident. In order to establish the right to proceed in this manner, it must also be shown that the nonresident defendant owns property in this State that can be reached by sequestration. This determination is not left to the plaintiff. On the contrary Rule 4(db) of this Court augments § 366 by providing that "[n]o order shall be entered under 10 *Del. C.* § 366" unless the nonresidency of the defendant appears in the complaint and unless the complaint is accompanied by the affidavit of the plaintiff "or other credible person" showing each defendant's last known address and also describing the property sought to be sequestered, giving its estimated value, identifying the nature of the defendant's title or interest, and disclosing the source of the affiant's information. If any of the foregoing are omitted, a reason must be given therefor. Thus both our Court rule and practice do provide for advance judicial review to determine that there is a factual basis for the service of process in this manner. The dual legal basis for its issuance, if the verified facts support it, is nonresidency plus ownership of property within the state. Being a jurisdictional tool only, its usage is not dependent upon the merits of the complaint as was true in *Fuentes* and *Mitchell*. The attachment powers of the state are not set in motion at the whim of the litigant. They are activated only by an order of this Court after it is satisfied that the plaintiff has demonstrated his right to invoke the sequestration statute so as to obtain jurisdiction over the nonresident defendant in an effort to get the merits of his

case before the Court. The *Breech* case, as I construe it, holds that the Court has no discretion to deny this statutory right to process once it is satisfied that a plaintiff has shown factors justifying the need to use it. In effect, this seems consistent with the instruction of *Mitchell*.

I find no basis for holding that 10 *Del. C.* § 366 is unconstitutional in that it fails to provide for strict control by the state in the use of its legitimate forces.

III.

Finally, the individual defendants attack § 366 on the theory that it is not truly an *in rem* proceeding, as held in *U. S. Industries Inc. v. Gregg, supra.* While recognizing that a state can obtain jurisdiction over nonresidents by an *in rem* attachment of their property within the state, *Pennoyer v. Neff, supra,* they argue that in such a case jurisdiction can only be acquired to the extent of the value of the property attached. They say that Delaware's sequestration statute clearly violates this since a nonresident, in order to secure the release of his property, must enter a general *in personam* appearance which thus exposes him to unlimited personal liability which may well exceed the value of the property attached. Thus, they contend, such a nonresident defendant is left with two choices once a sequestration order is issued. He can refuse to appear and run the risk of having his property sold to answer for any damages found due from him in his absence, or, he can submit to personal jurisdiction which the Court could not otherwise acquire and thereby expose himself to potential personal liability without limit.

To illustrate their point, they argue that in a true *in rem* proceeding a defendant has a right to appear for the sole purpose of defending the property attached, but that under Delaware's sequestration procedure he is not permitted to do so. They argue that a person has fundamental due process right to remain immune from personal jurisdiction in a state with which he has no substantial relationship, *International Shoe Co. v. Washington,* 326 U. S. 310, 90 L. Ed. 2d 95, 66 S. Ct. 154 (1945), and that due process further dictates that a waiver of this right is valid only if it results from voluntary action, *Hanson v. Denckla,* 357 U. S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). Thus, they conclude, if a nonresident is compelled to submit generally to the jurisdiction of a court that otherwise would have none over him, in order to defend his property held by that court, there can be no voluntary waiver of this due process right.

However, I see no compelling reason to deviate from the conclusions of Judge Stapleton in *U. S. Industries Inc. v. Gregg,* before whom these same arguments were apparently advanced. At 348 F. Supp. 1020 he noted as follows:

> "The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state. Thus, where stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a nonresident who has had no prior contacts with the forum state.
>
> "Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that the avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the

> action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the nonresident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiff's claim."

In short, the action as commenced is one against the property of the nonresident so as to induce his appearance, and at that point it is *quasi in rem* at best. If the nonresident is thereafter personally served or enters a general appearance, the action "also partakes of an in personam character." 6 *Am. Jur. 2d* 571, *Attachment & Garnishment* § 14. To the same effect: *Ownbey v. Morgan,* 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433 (1921); *Nelson v. McCormick, Mich. Supr.,* 54 N. W. 2d 694 (1952); *Sherwood v. Porter,* Ida. Supr., 76 P. 2d 928 (1938).

Moreover, the defendants' argument that sequestration is unconstitutional because it compels them to submit to possible personal liability in excess of the value of the property seized seems to necessarily acknowledge that it is constitutional to compel their appearance through attachment to the extent of that property value. Compare *Pennoyer v. Neff, supra.* Thus it appears that their argument goes more to the effect of any judgment that the plaintiff might recover than it does to his right to compel their personal appearance by sequestration process. It seems to be an argument that it is unconstitutional to compel a nonresident to appear at all where there is a possibility that the plaintiff is seeking to recover an amount in excess of that which the law will allow even though he may be entitled to recover some lesser amount. I do not feel that this constitutes a valid constitutional attack in view of the long established authorities approving Delaware's jurisdictional attachment processes.

I thus find no basis in the arguments of the individual defendants to vacate the sequestration order and to dismiss the complaint against them.

IV.

The final item for consideration is the separate motion of the defendant Greyhound to either quash or modify the sequestration order. This motion stems from the language of the order which authorizes the sequestrator to demand that Greyhound make appropriate entries on its books to show that the securities owned by the individual defendants are being held by the sequestrator and that Greyhound further "do all acts necessary to hold and preserve these securities." The notice given Greyhound by the sequestrator pursuant to the order also directs the corporation "not to transfer or permit to be transferred any of said shares of stock" unless authorized by the sequestration order or subsequent order of the Court.

Greyhound points to the fact that the stock interests sequestered here are represented by negotiable securities, that both the certificates and their owners are outside Delaware, and that there is no order prohibiting the individual defendants from selling or transferring their shares to a purchaser who has no knowledge of these proceedings. Thus it suggests that the individual defendants are free to sell or transfer their stock certificates and retain the proceeds. Greyhound further points out that under the Uniform Commercial Code adopted by Delaware, securities are negotiable instruments, 5A *Del. C.* § 8-301, title passes upon the delivery of the certificate, 5A *Del. C.* § 8-102, and a bona fide purchaser acquires it "free of any adverse claim," 5A *Del. C.* § 8-105.

Greyhound also relies on the construction given to similar provisions of the Uniform Stock Transfer Act by Chancellor Seitz in *Haas v. Haas, supra,* wherein he held

that even though Delaware had jurisdiction to determine ownership of stock under the statute placing its situs in Delaware for certain purposes, it must do so "with a recognition of rights created by virtue of our Uniform Stock Transfer Act." 119 A. 2d 362. The Chancellor further stated as follows at this same reference:

> "The statute giving this Court jurisdiction of such matters simply establishes the mechanics of service upon non-residents . . . and does not purport to freeze rights with respect to the ownership of property which may be brought within its ambit, particularly where 'negotiable' indicia of ownership are outstanding."

Thus, Greyhound's argument continues, since a bona fide purchaser of stock certificates takes free of adverse claims, he is entitled to insist that the issuer register the transfer of shares sold to him whether or not the transfer was rightful. 5A *Del. C.* § 8-401(1)(e). If the issuer refuses to do so or improperly delays, it becomes liable for any loss resulting to the purchaser. 5A *Del. C.* § 8-401(2). Consequently Greyhound asserts that the sequestration order which prohibits it from transferring any stock now owned by the individual defendants clearly exposes it to liability at the suit of a bona fide purchaser, transferee or pledgee of the individual defendants who would have a right under Delaware law to have it transferred.

As additional injury, it suggests that if it is to be bound by the sequestration order the commercial world will soon become aware that despite Delaware's adoption of the Uniform Commercial Code, stocks of Greyhound purchased on a national exchange may not be transferable because of undisclosed liens. This, it says, will cast a shadow over the tradeability of its listed stock and thus the

derivative action ostensibly brought for its benefit will actually cause it immeasurable injury.

Because it contends that in either event it will suffer a deprivation of its property without due process, it asks that the sequestration order either be vacated or else modified so as to exclude negotiable securities from its operation.

Greyhound urges that as a matter of policy its motion should be granted in order to show that Delaware favors the free and open transfer of stock as opposed to the confusion and loss that could flow from purchases of stock without knowledge of court-imposed attachment restrictions on their transfer. I think, however, that the General Assembly spoke to this policy issue when it enacted the modified version of the Uniform Commercial Code in this State. 5A *Del. C.* § 8-317 reads in pertinent part as follows:

> "§ 8-317. Effect on attachment and sequestration laws; attachment or levy upon security
>
> "(1) Nothing contained in this title shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this title is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

Thus by its terms the Delaware Uniform Commercial Code clearly provides that a proper sequestration, pursuant to 10 *Del. C.* § 366, of corporate stock having its situs in Delaware, pursuant to 8 *Del. C.* § 169, shall not be rendered invalid by any rights otherwise granted to owners or transferees of corporate stock by other provisions of the Code. In view of this I fail to see how it is within my

power to declare as a matter of policy that sequestration is invalid as to securities having their situs in Delaware merely because they are made negotiable upon delivery by other portions of the Code. The intent of the statute would seem to accord some measure of protection to Greyhound if it should refuse to register a transfer because it is complying with the sequestration order and thus 5A *Del. C.* § 8-317.

Two other factors should be noted. First, although *Haas* holds that the status of a bona fide holder for value is not necessarily lost because an action is pending concerning the ownership of stock or a restraining order against its transfer is outstanding, it must be kept in mind that that case involved a suit against the issuer and the record owner to compel a reregistration plus a restraining order against transfer pending a hearing. It did not involve an attachment of the stock by a court-appointed sequestrator. Obviously then, *Haas* arose from a violation of a restraint imposed on the defendants and thus involved no attempt by the Court to exercise control over either the stock certificates or the stock itself because of its situs. No doubt this same result would hold true under the Uniform Commercial Code in a similar factual setting. At the same time, I do not feel that *Haas* requires a reading of any more than what it says, namely, that where one makes a bona fide acquisition of stock from an owner who has been enjoined from transfering it, without knowledge of such restraint, and consequently where the stock itself was never before the court, his title is not necessarily defeated because of the existence of the *in personam* order against his transferor. I see no reason to read it as holding the same result to apply where the action is a *quasi in rem* proceeding to seize the stock itself, especially in light of the aforesaid legislative mandate.

Secondly, as pointed out in *Trans World Airlines, Inc. v. Hughes Tool Company,* Del. Ch., 187 A. 2d 350 (1962), our sequestration practice attempts to minimize the burden placed on one whose stock has been sequestered by giving him the right to control the investment of his seized property pending his appearance. The order does so here by allowing the individual defendants to authorize the transfer and sale of the stock at any time on the condition that the proceeds be deposited with the sequestrator subject to investment and reinvestment by him on such terms and conditions as directed by the defendants. Thus the defendants are free to transfer their stock, and Greyhound is free to register the transfer provided it is done through the sequestrator and the price received is not less than its market value. Also, this Court can permit and consider an application for release from sequestration made by one other than the record owner who claims a prior or superior right to ownership.

In addition, as plaintiff points out, an issuer is only under a duty to register a transfer of securities if, among other things, it has no duty to inquire into adverse claims to them. 5A *Del. C.* § 8-401(1)(c). If it has notice of an adverse claim (as certainly the notice from the sequestrator would provide), it must notify the adverse claimant that it will register the transfer within 30 days unless "an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction." 5A *Del. C.* § 8-403(2)(a). Presumably if such process does issue, the issuer cannot be held liable thereafter for refusing to register the transfer. If court process issued subsequent to a presentation for registration will protect an issuer from liability for failing to do so, I see no reason why process issued prior to such a request would be any less protective.

For these reasons, I feel that Greyhound's fear of liability and loss are more fanciful than real, and similarly I am not convinced that the sequestration order deprives it of property without due process of law.

V.

For the reasons set forth herein, the motions of both the individual defendants and the defendant Greyhound to quash and vacate the order of sequestration and, in the case of the individual defendants, to dismiss the complaint as to them, are hereby denied.

IT IS SO ORDERED.

Very truly yours,

GROVER C. BROWN

GCB:mlw
cc: Register in Chancery

APPENDIX C.

§ 366. Compelling appearance of nonresident defendant.

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresid ıt defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for

the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)